LE COPY

Office - Supreme Court, U.
FILED
JUN 25 1954
HAROLD B. WILLEY, Cl

No. 167

IN THE

Supreme Court of the United States

October Term, 1954

JOSEPH POMPROWITZ, GEORGE A. HORMEL & COMPANY, AND OSCAR MAYER & COMPANY, *Appellants,*

v.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, *Appellees.*

On Appeal from the United States District Court for the Eastern District of Wisconsin

---

Brief of Appellants in Opposition to Motion to Affirm Filed by the United States and Interstate Commerce Commission

---

WARREN H. WAGNER,
Attorney for Appellants,
1031 Investment Building
Washington 5, D. C.

WILSON - EPES PRINTING CO. - RE 7-6003 - WASHINGTON 1, D. C.

BLEED THROUGH POOR COPY

TABLE OF CONTENTS

PAGE

Preliminary statement 1

Statement of additional facts 2

The questions presented are substantial 3

Argument 4

Conclusion 24

Certificate of Service 25

Cases Cited

Adirondack Transit Lines v. United States, 59 F. Supp. 503, affirmed, 324 U.S. 824 ..... 9, 20

American Fruit Growers v. Brogdex Co., 283 U.S. 1 15

Atlantic Frt. Lines, Inc.—Petition for Declaratory Order, 51 M.C.C. 175 18

Campbell Sixty-Six Exp., Inc., v. Frisco Transp. Co., 46 M.C.C. 222 20

Coastal Tank Lines, Inc. v. Charlton Bros. Transp. Co., Inc. 48 M.C.C. 289 20

Dart Transit Co. v. Interstate Commerce Commission, 110 F. Supp. 876, affirmed, 345 U.S. 980 9

Descriptions in Motor Carrier Certificates, Ex Parte No. MC-45, 61 M.C.C. 209 ..... 2, 7, 8, 13, 14

Determination of Exempted Agricultural Commodities, 52 M.C.C. 511 15

Faltin Motor Transp., Inc., Ext.—Alternate Route, 51 M.C.C. 125 14

Fischbach Trucking Co. Common Carrier Application, 61 M.C.C. 539 16

Green Bros., Inc., Contract Carrier Application, 18 M.C.C. 94 12

Growers Cold Storage Co., Inc., Extension of Operations, 9 M.C.C. 563 12

Growers Cold Storage Co., Inc., Extension of Operation, 10 M.C.C. 725 11

Interstate Commerce Commission v. Weldon, 90 F. Supp. 873 15

Isbrandsten Co. v. United States, 96 F. Supp. 883 24

Keystone Transp. Co. Contract Carrier Application, 19 M.C.C. 475 ..... 16, 17

Manhattan Coach Lines, Inc., v. Adirondack Transit Lines, 43 M.C.C. 477 20

PAGE

Manners Common Carrier Application, 3 M.C.C. 571.... 12
Matlack v. United States, 119 F. Supp. 617..... 23
Matthews Extension of Operations—Frozen Foods, 48 M.C.C. 137 11
Modification of Permits—Packing House Products, Ex Parte No. MC-38, 46 M.C.C. 23, 48 M.C.C. 628 ..... 2, 6, 7, 8, 13, 14
Morgan v. United States, 304 U.S. 1..... 23
Noble v. United States, 319 U.S. 88..... 16
Pomprowitz Extension—Indiana—Michigan, 9 M.C.C. 301 9
Pomprowitz Extension—Packing House Products, 51 M.C.C. 343 ..... 1, 5, 6, 9
Quaker City Bus Co., 38 M.C.C. 603..... 21
Salvino v. United States, 119 F. Supp. 277..... 23
Secretary of Agriculture v. United States, U. S. Supreme Court, (No. 480) June 8, 1954..... 4
Smith Bros. Revocation of Certificate, 33 M.C.C. 465..19, 21
Superior Packing Co. v. Clark, 164 F. 2d 343..... 12
Tidewater Transfer Co., Inc., Extension—Wines in Bulk, 47 M.C.C. 495..... 21
United States v. Carolina Freight Carriers Corp., 315 U.S. 475 18
United States v. C., M., St. P. & P. Ry. Co., 294 U.S. 499 4
United States v. Rock Island M. Trans. Co., 340 U.S. 419 18
United States v. Seatrain Lines, Inc., 329 U.S. 424....19, 21
United Truck Lines v. Interstate Commerce Commission, 189 F.2d 816, cert. denied, 342 U.S. 830.....9, 10
Weldon v. Interstate Commerce Commission, 188 F. 2d 367, cert. denied, 342 U.S. 827..... 15

Statutes Cited

Interstate Commerce Act

Section 203(b)(6) 6
Section 209(a) 11
Section 209(b) 3, 8, 18
Section 212(a) 18
Section 220(a) 3

POOR COPY

In The

Supreme Court of the United States

October Term, 1954

Joseph Pomprowitz, George A. Hormel & Company, and Oscar Mayer & Company, *Appellants*,

v.

United States and Interstate Commerce Commission, *Appellees*.

On Appeal from the United States District Court for the Eastern District of Wisconsin

---

Brief of Appellants in Opposition to Motion to Affirm Filed by the United States and Interstate Commerce Commission

---

Preliminary Statement

This is appellants' reply, under authority of Rule 7(3), to a motion to affirm filed by appellees the United States and Interstate Commerce Commission. For convenience appellees will be referred to as the Government. The motion was received on May 28, 1954.

The motion and our Jurisdictional Statement describe the proceedings in the Court below and before the Interstate Commerce Commission. The report of the Commission under review is entitled *Pomprowitz Extension*—

Packing House Products, 51 M.C.C. 343, and is an appendix to the Jurisdictional Statement. The decision of the Court below is also reproduced as an appendix to appellant's Jurisdictional Statement. (119 F. Supp. 824)

Statement of Additional Facts

The motion does not state certain facts which should be before the Court when considering the motion in question. They are as follows:

The Commission as a result of a decision in 1943 issued a permit to a contract motor carrier to transport "dairy products, dairy by-products, manufactured or prepared foods" under contracts with "cheese and food processing businesses." (The permit is Appendix C to the Jurisdictional Statement.) Not until 1950 did the Commission say that "manufactured or prepared foods" did not include, for example, fresh sausage and (perhaps) smoked sausage, i.e., fresh meats and (perhaps) cured meats.

Beginning in May 1944 the motor carrier began entering into contracts with a few meat packers to transport fresh meats and packing-house products. (For present purposes, unless otherwise apparent, the term "packing-house products" will be understood to embrace salted, cooked, cured, preserved meats, and other edible meat products not including those which come within the term "fresh." See Ex Parte No. MC-38, *Modification of Permits—Packing House Products*, 46 M.C.C. 23, 33; and Ex Parte No. MC-45, *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209, 272.)

Since 1944 the motor carrier has increased his equipment and facilities, and these meat packers have established important markets in the territory embraced by the permit. The Interstate Commerce Act provides that the Commission may not restrict the right of the carrier to substitute or add contracts, or to add to his equipment and facilities, within the scope of his permit, as the

POOR COPY

BLEED THROUGH

development of the business and the demands of the public may require—Section 209(b) of the Interstate Commerce Act [49 U.S.C. 309(b)]

A recitation of the "lulling" by the Commission of the motor carrier and these shippers, and additional facts, are set forth in the Jurisdictional Statement. The Government did not answer or deny any of the statements therein contained.

If, in 1943, the Commission did not intend that fresh meats and edible packing-house products were included, it is significant that in 1946 the Commission's District Director having jurisdiction advised the motor carrier that he could haul them.

Here the Commission, years later, in effect, criticizes its own action, and seeks to cause the motor carrier and shipper to suffer as a result thereof.

Here the Commission hides behind its own failure to prohbit the filing[1] of contracts and rate schedules if they are contrary to the authority granted in the permit.

The Questions Presented Are Substantial

A motion to affirm is not sustainable unless it be shown that "the questions on which decision of the cause depends are so unsubstantial as not to need further argument." (Rule 7, par. 4)

This appeal presents substantial questions of general and fundamental importance in the administration of the motor carrier phase of the Interstate Commerce Act.

If the Commission may reduce or limit the extent of a motor carrier's authority, six years after issuance of a permit, then the holder of a permit has no security in the permit, nor can he rely upon the action of the governmental agency issuing it.

---

[1] The contracts with shippers and the schedules of rates must be filed with the Commission. Section 220(a) of the Act [49 U.S.C. 320(a)].

The basic question involved as to whether the Commission has authority to reduce the scope of a contract carrier's permit years after issuance, affects not only appellant carrier and appellant shippers herein, but also all carriers holding permits or certificates issued by the Commission, and all shippers making use of motor carrier facilities—both contract and common.

If the Commission can go behind a permit issued by it and, as a result, limit the scope of the simple language used in the permit, as the Commission is doing here, then the words of the statute requiring the Commission to define the scope of the authority in the permit are meaningless, and a permit serves no purpose.

A number of substantial questions of law, set forth in the Jurisdictional Statement, are presented by this appeal.

Argument

May we preface our argument by urging that consideration should be given to the ambiguity of the Commission's decision assailed here. It is certainly not clear whether the Commission holds that the transportation of edible packing-house products comes within the scope of the authority granted, and whether the only questionable commodities are fresh meats and inedible packing-house products. And, mark you, the lower Court did not attempt to "spell out" [1] what the Commission held.

Throughout, the language of the decision seems to indicate that edible packing-house products come within the term "manufactured or prepared foods" and that applicant may continue to transport them, but may not handle fresh meats or inedible packing-house products.

---

[1] *United States* v. *C., M., St. P. & P. Ry. Co.*, 294 U.S. 499 510. See also *Secretary of Agriculture* v. *United States*, (No. 480) decided by this Court June 8, 1954.

On page 345 of the printed decision (51 M.C.C.) the Commission states "Applicant for some time has been transporting fresh meats under color of his authority to transport prepared and manufactured foods." It will be observed that packing-house products are not mentioned there, even though the carrier had for the same length of time been transporting them with the fresh meats.

On the same page the Commission indicates that it is the opinion of one of the shippers that fresh meats are a prepared food. No mention is there made of packing-house products, which we also contend are "manufactured or prepared foods."

Again, on page 346 reference is made to a shipper who handles fresh meats, as well as "items not intended for human consumption."

In referring to two other shippers, on page 346 of the printed decision, the Commission states that they interpret applicant's authority as embracing "fresh meats and *other* packing-house products." (Our emphasis) We assume "other" means inedible.

In referring to still another shipper, on page 347, the question of interpretation seems to be confined to fresh meats.

On page 348, the Commission indicates that the principal question posed by applicant is whether the term "manufactured or prepared foods"

> "embraces packing-house products *generally* and fresh meats *in particular*. In our opinion it does not. In the first place, the term in question contemplates only those food items which are fit for human consumption, and necessarily excludes, therefore, the numerous packing-house products not so adapted." (Our emphasis)

In other words, the term includes edible packing-house products, but not inedible.

Where the Commission refers to "packing-house products *generally*," we assume the term "generally" is added

to indicate the inedible products. We have yet to see any authority granted by the Commission to handle "packing-house products, *generally.*" So far as we know, this is the first time that expression has been used by the Commission.

At the top of page 349 it appears that the term "packing-house products" embraces certain "prepared foods" but not all articles contained in the appendix to Ex Parte No. MC-38, *Modification of Permits—Packing House Products,* 48 M.C.C. 628.

The Commission says that to construe the authority in question as authorizing the transportation of fresh meats would be unreasonable and contrary to the sense in which the term was used. (Page 349 of the decision) Mark you, fresh meats only are mentioned.

In the next sentence the Commission states that despite the preliminary process, fresh meats are not a manufactured or prepared food. (Page 349 of the decision) Again, the Commission does not speak of edible packing-house products.

And in the next sentence the Commission says that fresh meats may become a manufactured or prepared food only after they have been converted from their "natural state" into a different form. (Page 349 of the decision) Does that mean that a fresh leg of pork becomes a manufactured or prepared food when it becomes a ham and therefore comes within the term "manufactured or prepared food" and may be transported by applicant? Surely a leg of pork in its "natural state" is not livestock and therefore exempt from regulation—see Section 203(b)(6) of the Interstate Commerce Act. [49 U.S.C. 303(b)(6)]

These various explanations leave the impression that the Commission approves the handling of edible packing-house products under the authority granted, but not fresh meats. We are at a loss to understand the differentiation. We say that because, within the category of fresh meats are not only carcass meat but also many types of

BLEED THROUGH POOR COPY

fresh sausage, etc. Not only as to the latter but as to the former is there a detailed manufacturing and preparing process. They are certainly not in their "natural state."

The decision of the Commission is not definite. Must we subject ourselves to further Court action—criminal or civil—in order to determine what the Commission meant and what the lower Court meant.

In connection with the impossibility to "spell out" what the Commission means, by its decision, we beg leave to refer to its decisions in Ex Parte Nos. MC-38 and 45, *supra*. In those decisions the Commission included "Meats, fresh, salted, cooked, cured and preserved." In other words, in one expression it combined fresh meats and packing-house products. It also included "sausage" without differentiating fresh or smoked. It included all kinds of canned and packaged meats and meat products. It included cheese and other dairy products. It included lard substitutes, etc. (46 M.C.C. 23, 33, 34; 61 M.C.C. 209, 272, 273)

In its decision in Ex Parte No. MC-45, the Commission said:

> ". . . There is very little movement of truckload shipments of fresh meat or other single commodities. In practically all instances the movement is in mixed truckloads of meats and packing-house products and occasionally dairy products." (61 M.C.C. 209, 230)

We believe it to be error for the Commission and the lower Court not to "spell out" what is meant.

What has been said clearly demonstrates that the only foundation for the decision of the Commission and the lower Court must be ascertained not in the plain language of the permit, but what went before its issuance, which is not permissible.

The Government goes back of the permit and relies upon a footnote in an unreported decision dated November 27, 1943, to determine the "intent" of the Commission". The Government even says that "No meat or packing-

house products are included" in the list in the opinion of 1943. (Page 3 of the Motion) But meat packers produce and ship sandwich spreads, soups, [both of which would come within canned meat and byproducts] cheese and other dairy products, oleomargarine, lard substitutes, and the like, which are specifically named in the footnote in that unreported opinion. See appendixes to Ex Parte Nos. MC-38 and 45.

May we emphasize the fact that a permit stands on its own bottom. It does not refer to the decision itself and make the decision a part of the permit. An "order" of the Commission does that. But that is not so as to a permit. In other words, the four corners of a permit, and the four corners alone, are supposed to speak. It is the last word.

It is the carrier's authority to roll. It is held out to the world by the Commission as a description of what may be done and what may not be done. If that is not so, why issue a permit.

We do not believe that it is contemplated under the Interstate Commerce Act that where plain language is used, as is set forth in this permit, it is required that one must go back to the antecedents of the permit in order to determine what the plain words of the permit mean.

In that connection it will be noted that the Government, in going back of the permit, refers to a contract with Kraft. (Page 3 of Motion) Sight should not be lost of the fact that the Act specifically authorizes a contract carrier to substitute or add contracts within the scope of the permit, add to his equipment and facilities, and the like—in fact, the Commission is prohibited from restraining the contract carrier of that right. Section 209 (b) of the Act [49 U.S.C. 309(b)]

In the unreported decision on which the Government and the lower Court rely, and back to which they go for support, it is stated that Pomprowitz then (in 1943) owned and operated 82 pieces of equipment, i.e., 38 trac-

tors, 36 semi-trailers, and 8 straight trucks. (Sheet 8 of mimeographed Commission opinion) When the decision here under attack was rendered, Pomprowitz owned and operated 172 pieces of equipment, consisting of 3 passenger cars, 5 pick-up vehicles, 69 tractors, and 79 semi-trailers. (51 M.C.C. 344)

In its decision in *Pomprowitz Extension—Indiana—Michigan*, 9 M.C.C. 301, the Commission authorized the handling of "dairy products, prepared foods, and other commodities requiring refrigeration or similar protective service" between Indiana and Michigan. That authority has been combined with the same phase of the motor carrier's permit here under consideration, the territorial scope being added at the end. (See last portion of permit which is Appendix C of the Jurisdictional Statement.) In other words, the commodity description in the permit was made broad enough to include commodities coming within the above description.

The Government states that the Commission's interpretation of language in a certificate or permit is controlling, unless clearly unreasonable, and it cites the following cases: *Adirondack Transit Lines* v. *United States*, 59 F. Supp. 503, 504 (S.D.N.Y.), affirmed, 324 U.S. 824; *Dart Transit Co.* v. *Interstate Commerce Commission*, 110 F. Supp. 876, 880 (D. Minn., 4 D.), affirmed, 345 U.S. 980; *United Truck Lines* v. *Interstate Commerce Commission*, 189 F. 2d 816, 817 (C.A. 9), certiorari denied, 342 U.S. 342 U.S. 830. (Page 2 of Motion) None of those cases is relevant here.

In the *Adirondack* case the question was whether a certificate authorizing transportation across the Hudson River included passing through a tunnel not in existence when the certificate was issued. The case is inapt.

In the *Dart* case authority was granted to transport packing-house and dairy products, equipment, material, and supplies, and canned goods and canning factory supplies. Among the questions presented were: Would that

authorize the shipment of tin plate from Gary, Ind., to a manufacturer of tin cans; boxes for Waldorf Paper Company; glass bottles for the Toni Company; and cases or cartons from a box company to the Pepsi Cola Bottling Company. Questions like those are in no way similar to the question here presented. Here the permit is not ambiguous in any sense of the word.

In the *United Truck Lines* case the question related to territorial scope, and turned on what is an "off-route" point. We have here no technical language.

The Government states that general descriptions of commodities have unavoidable ambiguities. (Page 2 of Motion) Unquestionably, there are times when unavoidable ambiguities occur. But that situation is not here. We believe the language here is so plain that it is not even necessary to refer to dictionary meanings.

The Government states that "Commission and trade usage, history and context necessarily play a frequent and important role in the process of interpretation." (Page 2 of Motion) As for trade usage, we need only look at the fact that the Commission itself indicates that a meat packer processes foods, and the lower Court makes a similar holding.

The Government states that the interpretation by the Commission is "an eminently reasonable one." (Page 2 of Motion) If the interpretation of the Commission is "an eminently reasonable one," we are at a loss to know what the "interpretation" is. As we see it, we are unable to "spell out" what the Commission actually holds. The Commission itself is indefinite, so is the Court below.

In connection with the question whether the interpretation of the Commission is "an eminently reasonable one," we beg leave to refer to "Commission . . . usage" by citing a few of the reported decisions of the Commission which indicate that the holding of the Commission here is not reasonable, but arbitrary. All of these decisions were rendered prior to the one here under attack.

In *Matthews Extension of Operations—Frozen Foods*, 48 M.C.C. 137, 139, 146, authority was given to transport frozen foods. The Commission speaks of meat as "prepared food" in the following language:

> ". . . In the near future, it contemplates expanding its business especially in the prepared food line. It proposes to utilize the freezing and storage capacity of plants in the New York area for the preparation of frozen fish, *meat, and other prepared food products* during the off season for freezing fruits and vegetables. These frozen *prepared foods* would be shipped from points of storage in the New York area to various points in the territory involved herein, . . ." (Emphasis supplied.)

The language used in the findings should also be noted. It is said:

> "We find that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle over irregular routes, (1) of frozen *foods* (a) between points in New York within 75 miles of and including Rochester, N. Y., on the one hand, and, on the other, New York, N. Y., Baltimore, Md., Washington, D. C., . . ., except frozen *meats* to and from the points named in paragraph 2 of the appendix hereto, . . ." (Emphasis supplied.)

This last quotation clearly indicates that when the Commission intends to restrict the word "food" so as not to include "meats" (within a given geographical area or otherwise) it does so in specific language for the words "food" or "prepared food" in a certificate or permit manifestly include meats, if not expressly excluded.

In *Growers Cold Storage Co., Inc., Extension of Operation*, 10 M.C.C. 725, applicant sought authority to handle "chiefly food products." The Commission stated at pages 726 and 727:

> "Applicant has been operating as a motor carrier since prior to July 1, 1935. It seasonably filed an application under the 'grandfather' clause of section 209(a) of the act, covering operations conducted by

it as a contract carrier of *'chiefly food products'* on July 1, 1935, and continuously since that time, embracing generally a portion of the same territory as here in issue. . ."

". . . Applicant is at present under written contact with approximately eight *food-product companies* for transporting and warehousing the various commodities, consisting principally of fresh or frozen fruits, vegetables, meats, poultry, and fish. . ." (Emphasis supplied)

Authority was granted to transport "food products, fresh or frozen," clearly including meats. To the same effect, see also *Growers Cold Storage Co., Inc., Extension of Operations,* 9 M.C.C. 563, 565.

In *Manners Common Carrier Application,* 3 M.C.C. 571, general commodity authority was given. The Commission stated, at page 573, as to certain of the operations:

"No. MC-20069—The operations to which this application relates have consisted principally of the transportation of *packing-house* and dairy products, groceries, *and other food products* from Nashville. . . ." (Emphasis supplied.)

In *Green Bros., Inc., Contract Carrier Application,* 18 M.C.C. 94, authority was sought and granted to transport "foodstuffs and restaurant equipment and supplies." The Commission said at pages 96 and 97:

"Special equipment has been used for the transportation of *foodstuffs* for Waldorf. This operation requires the use of insulated bodies that are built to accommodate the containers of various sizes which carry hot soups, *cold meats,* canned goods, fresh pies, fish, and *other foodstuffs. . . .*" (Emphasis supplied.)

In *Superior Packing Co.* v. *Clark,* 164 F. 2d 343, 349, the Court held that under the Emergency Price Control Act of 1942, 50 U.S.C.A. Appendix, Sec. 903:

"A live steer is an 'agricultural commodity,' produced on a farm and sold by a farmer in its raw, natural or unprocessed state. A beef carcass, a

POOR COPY

BLEED THROUGH

> wholesale cut, retail cuts such as steaks or roasts, beef brains, kidneys, hearts, livers, or other edible by-products, as well as meat products resulting from still further processing, such as sausages—these are all distinct commodities not produced on the farm and sold by farmers. They are not 'agricultural commodities', but commodities 'processed or manufactured in whole or substantial part' from an agricultural commodity, the live steer. The slaughterer's operation of producing these various meat products would be described as a processing operation in the everyday use of words, and it certainly is such from the point of view of the steer."

The words used in the permit here considered plainly include fresh meats and packing-house products.

The question here is as to "manufactured and prepared food." It does not embrace the non-edible articles produced by meat packers. They are not here.

The Government states that apart from the history of this permit the Commission in its opinion states that the term "packing-house products" "has long had a peculiar meaning of its own in the transportation industry." Also the Government points out that the opinion here under consideration indicates that a large variety of commodities which are not edible are transported under the term packing-house products which are not embraced by the term "foods". (Footnote 7, page 4 of Motion)

That there has *not* been a long-standing, peculiar meaning of the term "packing-house products" is indicated by the fact that the Commission instituted two proceedings in which that very question was considered. They are Ex Parte No. MC-38, decided December 19, 1945; and Ex Parte No. MC-45, decided October 20, 1952. Mark you, those decisions were rendered long subsequent to the time of the Commission's first decision which resulted in the issuance of this permit, and one was rendered after the decision here under consideration.

Even assuming that the term "packing-house products" has a peculiar meaning, that does not necessarily mean that it is not embraced by the term "foods."

And mark you, nowhere have we contended in this proceeding that the term "manufactured or prepared foods" embraces inedible packing-house products.

If the terms were so definitely understood, why was it necessary to institute Ex Parte No. MC-38, and even in 1952 again to define the term when used in certificates in Ex Parte No. MC-45?

Also note that MC-38 and MC-45 did not revise any outstanding permits. (46 M.C.C. 23, 31; 61 M.C.C. 214, 270)

Surely the Commission cannot rewrite a permit or certificate whenever a whim strikes it.

The word "food" has no *special* meaning in any industry, and has no limitations. The opposition point to no special definitions. If the Commission intends to restrict the scope of a permit, it does so in unmistakable terms. With great particularity the Commission restricts the territorial scope. In the very permit before the Court the Commission excepts part of Michigan.

If fresh meats and packing-house products had a special meaning, then they should have been exempted from the permit issued in this proceeding. It is customary for the Commission, whenever it intends to exempt commodities, specifically so to designate in certificates. Innumerable instances could be cited wherein the Commission has provided exemptions. As one of hundreds of illustrations, it will be observed that in *Faltin Motor Transp., Inc., Ext.—Alternate Route*, 51 M.C.C. 125, 129, the Commission, as is its usual custom, granted authority to transport "general commodities except those of unusual value, dangerous explosives, livestock, household goods . . . commodities in bulk, and commodities requiring special equipment."

It is interesting to compare the statement in the Commission's own decision:

> ". . . They (fresh meats) may become a manufactured or prepared food only after they have been converted from their natural state into a different form" (51 M.C.C. 349)

BLEED THROUGH POOR COPY

with the contentions here made by the Government that fresh sausage and edible packinghouse products are not "manufactured or prepared foods."

In *American Fruit Growers* v. *Brogdex Co.*, 283 U.S. 1, 11, the Supreme Court said:

> "'Manufacture,' as well defined by the Century Dictionary, is 'the production of articles for use from raw or prepared materials by giving to these materials new forms, qualities, properties, or combinations, whether by hand-labor or by machinery.' Also, 'anything made for use from raw or prepared materials.'"

In *Determination of Exempted Agricultural Commodities*, 52 M.C.C. 511, 547, wherein the Commission dwelt at great length upon the question what are "manufactured products" of agricultural commodities, the Commission held that the removal of the shell from an egg and the removal of the shell from raw peanuts changes the egg or the peanut into a manufactured product.

On April 9, 1951, in *Weldon* v. *Interstate Commerce Commission*, 188 F. 2d 367, the Court of Appeals for the Sixth Circuit affirmed the decision of the lower Court in *Interstate Commerce Commission* v. *Weldon*, 90 F. Supp. 873, 876, (W.D., Tenn., E.D.), "for the reasons set forth in the memorandum opinion of the District Court." (Certiorari denied, 342 U.S. 827) In that proceeding the lower Court held that raw shelled peanuts were "manufactured commodities" and not an exempt "agricultural commodity." The lower Court said:

> "Here the peanuts, after harvesting, are transported to a shelling plant where, by the use of elaborate machinery, the shell is removed, thereby leaving the kernel as one product and the shell as another. The peanut has then undergone its first manufacturing process and is no longer an agricultural commodity but has now been changed into a commercial item ready for its next successive process of manufacture which may include its removal to a crushing

> plant, where the kernels are further processed into such items as peanut oil and peanut butter."

The Government speaks of substantial parity between future operations and prior operations, and cites *Noble* v. *United States*, 319 U.S. 88. (Footnote 3, p. 2 of Motion) In the *Noble* case all the Court held was that the Commission had authority to designate the type of industry which could be served by a motor carrier under a given permit. That is taken care of here by the provision that contracts could be made with "cheese and food processing businesses," and the Commission in effect, and the Court specifically, held that a meat packer is in the food processing business. So that decision is not helpful here.

It seems rather anomalous that a concern can be in the food processing and manufacturing business but none of its products constitute manufactured or prepared food.

The proceeding in which the Commission established the principle of designating the type of industries for which a contract carrier may haul specified commodities was *Keystone Transp. Co. Contract Carrier Application*, 19 M.C.C. 475. That principle is termed by the Commission as the "Keystone" restriction. That is the "ruling case." Observe the following quotation from the Commission's February 18, 1953, decision in *Fischbach Trucking Co. Common Carrier Application*, 61 M.C.C. 539, 551:

> "In this connection, it is significant that with the restriction, inherent in a contract-carrier status, on the number of shippers which may be served and particularly when a 'Keystone' restriction has been imposed, grants of contract-carrier authority have been in many instances more liberal both territorially and commoditywise than would have been the case had common-carrier authority been involved. Actually the commodity descriptions now contained in applicant's permits are, in many instances, broad in language and peculiar to contract-carrier grants and some of them are circumscribed by 'Keystone' restrictions. . . ."

In the *Keystone* decision the Commission indicated that "applicants would haul a very wide variety of commodities, of which those shown in Appendix E are illustrative." (19 M.C.C. 480) In Appendix E the long list includes items such as dairy pro iucts, like cheese and margarine; vegetable oils, fresh meats, smoked and canned meats, etc. In the original *Keystone* decision the Commission authorized the Keystone Transportation Company to handle "such merchandise as is dealt in by wholesale, retail, and chain grocery and food business houses, etc." (19 M.C.C. 483)

In the *Keystone* decision the Commission indicated that in the administration of the Act it has in several cases pointed out that a contract carrier under the permit granted may substitute or add contracts within the scope of the permit. And in several instances the Commission has refused to limit permits so as to preclude the carrier from transporting goods for a shipper other than that with which it had a contract at the time of the hearing. (19 M.C.C. 484, 485) It will, therefore, be observed that in the "Keystone" proceeding the terms used in the commodity description nowhere mention fresh meats or packing-house products, and yet there can be no question but what they were embraced thereby.

If the Commission intended to restrict the scope of the permit, it could have done so in simple unmistakable language. The Government and the lower Court refer to a "companion" case dealing with fresh meats and packing-house products. (Page 4 of Motion; third paragraph from end of decision of the lower Court.) The "companion" case merely demonstrates that the Commission did not commit an inadvertent error, and emphasizes that if it intended to exclude fresh meats and packing-house products, it should have done so, because it had the subject squarely before it.

In addition, if the Commission "intended" to exclude meat packers from the businesses with which the carrier

might contract, it could have and should have said so. Of course, the Commission could not confine the permit to one concern—Kraft—because of the restriction in Section 209(b) of the Act [49 U.S.C. 309(b)].

As pointed out by this Court, there is no "unfettered power in the Commission to change the certificate at will." That would violate Section 212(a) of the Act [49 U.S.C. 312(a)]. *United States* v. *Rock Island M. Trans. Co.*, 340 U. S. 419, 435.

Significant, because of its absence here, is the fact that neither the Commission nor the lower Court even mentions the statutory provision dealing with the modification or change of a permit.

True, the Commission has a wide discretion in determining the scope of authorities it grants. But that discretion ends after the permit is issued and the motor carrier starts rolling on basis of that permit.

This Court in the *Carolina Carriers* case [1] said that the Commission may not "atomize" too closely. In the discretion of the Commission it may use generic terms or it may use specific terms. But when it speaks in the permit, it is through speaking. The permit must speak for itself. It is the document to which the world and the Courts must look. It is not for the Government to hide behind any improprieties as to the Commission's own action.

Let us see what the Commission has said on this subject.

In *Atlantic Frt. Lines, Inc.—Petition for Declaratory Order*, 51 M.C.C. 175, 190, the Commission said:

> "Finally, it is contended that we could not have made a valid grant of the authority in question because no evidence was presented upon which to predicate a finding that petitioner's predecessors had engaged in such commerce on and continuously since

[1] *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475.

POOR COPY
PLEASE THROUGH

June 1, 1935. By this argument we are, in effect, asked to review the underlying evidence to determine if it in fact supports the authority granted in the certificate. This we cannot lawfully do. The 'grandfather' rights of petitioner have been determined after exhaustive proceedings involving three hearings and its certificate issued. Section 212(a) of the act provides the only procedure for the revocation of certificates, and that section can be invoked only 'for willful failure [on the holder's part] to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate . . .' Construing this section, the entire Commission in *Smith Bros. Revocation of Certificate*, 33 M.C.C. 465, stated:

> 'In our opinion, the language of the foregoing section is clear and definite and unmistakably shows that Congress intended that a certificate, once effective, may be terminated by us only on the conditions, and according to the procedure, therein specifically provided. We may issue decision upon decision, and order upon order, on an application for a certificate so long as sufficient reason therefor appears and until all controversy is determined, but once a certificate, duly and regularly issued, becomes effective, our authority to terminate it is expressly marked off and limited. All the antecedent decisions and orders are essentially procedural in character, and may be set aside, or vacated, but the certificate marks the end of the proceeding, just as the entry of a final judgment or decree marks the end of a court proceeding.'

"This opinion was cited with implied approval by the Supreme Court in *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424. Thus, having found that petitioner's transportation between the points in question was bona fide and in interstate commerce, and having issued a certificate accurately reflecting such findings, we may not now review the underlying evidence to determine if it was sufficient to support such findings. That litigation is closed."

In *Coastal Tank Lines, Inc.*, v. *Charlton Bros. Transp. Co., Inc.*, 48 M.C.C. 289, 299, 300, 301, 302, the Commission said:

> ". . . While it is true, as pointed out by complainants, where the terms of a certificate are patently ambiguous, as was the case in *Manhattan Coach Lines, Inc.*, v. *Adirondack Transit Lines*, 43 M.C.C. 477,[1] it is proper to consider antecedent matters in order to ascertain the true meaning. There is no ambiguity in the language of defendant's certificate here. The only question here is whether the defendant is conducting unauthorized operations. The answer to that question must be found in the language contained in the certificate. . . .
>
> "In the light of the foregoing, it is clear that in this proceeding, the sole criterion, as to whether the defendant is conducting unauthorized operations, is the terms of the certificate. In the *Campbell Sixty-Six* case [46 M.C.C. 222] the Commission made it abundantly clear, that intentions or representations as to limitations of the type of service to be conducted, even when contained in reports under which certificates are issued, are of no significance in determinations of whether a service is being performed in accordance with the terms of the certificates. The definitions of commodity groups in the *Classification* case hardly can have greater significance when they are not referred to in the certificate. . . .
>
> ". . . Interpretations of certificates based on classifications of motor carriers, or on the basis of matters antecedent to the issuance of a certificate, the terms of which are not patently ambiguous, can only lead to instability in the motor carrier industry and uncertainty among their patrons as to the operating rights of motor carriers. Here there is no ambiguity in the terms of defendant's certificate, to the extent in question, and only the terms of the certificate may be looked to in determining its operating rights. . . .

[1] This is the Commission decision which was under attack in *Adirondack Transit Lines* v. *United States*, to which reference is made hereinbefore.

"While it may be that when the certificate was originally issued to the defendant, petroleum products, in bulk, in tank trucks, should have been excepted from the grant of authority, they were not, and we may not now by interpretation, so modify the certificate. Such action in the circumstances here disclosed would amount to a partial revocation of the defendant's certificate without benefit to it of the procedure provided in section 212(a) of the act. Compare *Tidewater Transfer Co., Inc., Extension—Wines in Bulk,* 47 M.C.C. 496."

In other words, once issued, a certificate or permit must be recognized for what it says. It may not be modified or revoked except for the reasons specifically recited in the statute. None of those reasons exists here.

In *United States* v. *Seatrain Lines,* 329 U.S. 424, 430, 432, this Court said:

". . . But in ruling upon its power to revoke motor carrier certificates, the Commission itself has held that unless it can find a reason to revoke a motor carrier's certificate, which reason is specifically set out in section 212(a), it cannot revoke such a certificate under its general statutory power to alter orders previously made. Re *Smith Bros. Revocation of Order,* 33 M.C.C. (F) 465.

". . . But, as the Commission has said as to motor carrier certificates, while the procedural 'orders' antecedent to a water carrier certificate can be modified from time to time, the certificate marks the end of that proceeding.[7] The certificate, when finally granted and the time fixed for rehearing it has passed, is not subject to revocation in whole or in part except as specifically authorized by Congress. Consequently, the Commsision was without authority to revoke Seatrain's certificate. That certificate, properly interpreted, authorized it to carry commodities generally, including freight cars, on the routes for which the certificate originally issued. . . ."

"[7] See Re Smith Bros. Revocation of Certificate, and Re Quaker City Bus Co. (F) both supra." [33 M.C.C. 465 and 38 M.C.C. 603, respectively]

In addition, we beg leave to refer to the fact that the Commission had in other cases previously held that the term "foods" included fresh meats and packing-house products, as hereinbefore indicated.

We contend that the Commission's action here is arbitrary, capricious, and contrary to law.

The Government refers to certain permits purchased by the motor carrier embracing meats and packing-house products in a large part of the area covered by the permit in question. (Page 4 of Motion) The fact is that the last of the purchases was sought by application filed June 27, 1944 (MC-F-2572), prior to the issuance of the final permit here considered, i.e., before the motor carrier knew definitely what authority would be granted under the grandfather application. Also, in the purchase of that authority the motor carrier's real concern was authority to transport asphalt, asbestos, and magnesia products from Waukegan, Ill., to Milwaukee, Wis. Again, in the motor carrier business one carrier will buy out another to remove competition.

The Government states that there is no challenge made of the correctness of the Commission's findings that the evidence does not establish "a need for a grant of authority to engage in the described transportation." (Page 5 of Motion) We do challenge that statement. The mere existence of the movement of the traffic here in question over the number of years it has moved, and the fact that it is in volume, establishes a definite need for the authority sought. And in that connection we specifically requested further hearing to develop more fully that fact, having been of the belief that the primary question before the Commission was the one of interpretation—our going to the Commission having been at the insistence of the District Director of the Commission.

The lower Court specifically stated that "it is undoubtedly true that plaintiff's principal endeavor at the hearing before the Commission was on the interpretation

BLEED THROUGH POOR COPY

of his present authority." (Next to last paragraph of the lower Court's Opinion) In this connection may we refer to the decision in *Salvino* v. *United States,* 119 F. Supp. 277, where the United States District Court for the Western District of Washington, N.D., on February 24, 1954, said:

> ". . . Briefly, it is our opinion that the order would deprive plaintiff of a substantial part of his existing business without a full and adequate hearing. Again we quote from the language of the Supreme Court in *Morgan* v. *United States, supra,* [304 U.S. 1] at page 22, emphasizing the basic requirement that a full and fair hearing be accorded parties in controversies before administrative agencies:
>
> > " 'The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they were created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play.' "

See also *Matlack* v. *United States,* 119 F. Supp. 617, Eastern District of Pennsylvania, March 31, 1954.

Where the record before the Commission is principally based upon interpretation of the permit issued by the Commission in an application for that interpretation filed at the insistence of an official of the Commission, the Commission is guilty of abuse of discretion in failing further to hear the proceeding to obtain a record on the question of the issuance of a new permit.

It is interesting to note the closeness of the vote of the Commission denying our petition to rehear. Of the Commissioners on the Division which initially decided the

case, the vote was two to one; and the vote of the whole Commission was six to five.

May we refer to the views of former Commissioner Aitchison expressed before a Senate subcommittee in connection with certain pending bills concerning the obligations of administrative agencies, which were quoted by a three-judge Court for the Southern District of New York on March 21, 1951, in *Isbrandsten Company v. United States*, 96 F. Supp. 883, 892:

> "'They [administrative agencies] are not expected merely to call balls and strikes, or to weigh the evidence submitted by the parties and let the scales tip as they will. The agency does not do its duty when it merely decides upon a poor or nonrepresentative record. As the sole representative of the public, which is a third party in these proceedings, the agency owes the duty to investigate all the pertinent facts, and to see that they are adduced when the parties have not put them in . . . The agency must always act upon the record made, and if that is not sufficient, it should see the record is supplemented before it acts. It must always preserve the elements of fair play, but it is not fair play for it to create an injustice, instead of remedying one, by omitting to inform itself and by acting ignorantly when intelligent action is possible . . .'"

The failure of the Commission further to hear is error.

Conclusion

Because of the substantial questions of vital public importance presented by this appeal—questions which have never been passed upon by this Court—appellants respectfully pray that the motion to affirm be denied, and that the case proceed to a determination on its merits.

Respectfully submitted,

Warren H. Wagner
Attorney for Appellants

Certificate of Service

I hereby certify that I have this date served copies of the attached Brief of Appellants in Opposition to Motion to Affirm upon Simon E. Sobeloff, Esq., Solicitor General, Department of Justice, Washington, D. C., and Edward M. Reidy, Esq., Chief Counsel, Interstate Commerce Commission, Washington, D. C., by causing copies thereof to be mailed to them at their respective addresses.

WARREN H. WAGNER
Attorney for Appellants

Dated at Washington, D. C.
June 16, 1954